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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 16-3113

SAMUEL J. RUMPH, APPELLANT,

V.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

ORDER

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

On May 2, 2016, the Board of Veterans' Appeals (Board) issued a decision denying entitlement to service connection for a right knee disorder, lumbosacral spine disorder, a left ankle disorder, a cervical spine disorder, a right shoulder disorder, and a left shoulder disorder. The Court received the appellant's Notice of Appeal (NOA) on September 1, 2016, more than 120 days after the Board mailed its decision and thus outside the statutory period in which to file an NOA. *See* 38 U.S.C. § 7266(a); U.S. VET. APP. R. 4(a).

On September 28, 2016, the Court ordered the appellant to show cause why his appeal should not be dismissed for untimely filing. On October 28, 2016, the appellant filed his response. He explains that equitable tolling of the 120-day appeals period is warranted, as he "is diagnosed with the debilitating disease of schizophrenia, which causes him to lose complete track of days." Appellant's Response at 1. He submitted undated VA treatment records showing a Global Assessment of Functioning (GAF) score of 30, which he alleges were from treatment received in August 2016. *Id.* at 2. He further contends that his NOA was only 2 days outside of the 120-day appeal period. *Id.* at 1.

To be timely, an NOA must be filed with this Court within 120 days after the date the Board decision was mailed to the appellant. 38 U.S.C. § 7266(a); U.S. VET. APP. R. 4(a). Although "an important procedural rule," the 120-day period is subject to equitable tolling when circumstances "preclude[] a timely filing despite the exercise of due diligence." *Bove v. Shinseki*, 25 Vet.App. 136, 140 (2011) (per curiam order). Equitable tolling is warranted in circumstances such as "(1) a mental illness rendering one incapable of handling one's own affairs or other extraordinary circumstances beyond one's control." *Id.* The U.S. Court of Appeals for the Federal Circuit has emphasized that

"[e]quitable tolling is not 'limited to a small and closed set of factual patterns,'" but "[r]ather, courts acting in equity have emphasized 'the need for flexibility' and 'for avoiding mechanical rules,' and have proceeded on a 'case-by-case basis.'" *Sneed v. Shinseki*, 737 F.3d 719, 726 (Fed. Cir. 2013) (quoting *Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005), and *Holland v. Florida*, 560 U.S. 631, 649-50 (2010)). The appellant carries the burden of demonstrating that the circumstances surrounding the late filing of his or her NOA warrant equitable tolling of the 120-day judicial appeal period. *See id.* at 725; *Checo v. Shinseki*, 26 Vet.App. 130, 132 (2013) (burden of establishing entitlement to equitable tolling rests with the appellant), *rev'd and vacated in part on other grounds*, 748 F.3d 1373 (Fed. Cir. 2014).

Here, the Court concludes that the appellant has failed to demonstrate the existence of extraordinary circumstances. Specifically, although he argues that his mental disability "causes him to lose complete track of days," Appellant's Response at 1, his assertion does not demonstrate that he was "[un]able to engage in rational thought or deliberate decision making" or incapable of handling his own affairs or of functioning in society as a result of mental disabilities. *Barrett v. Principi*, 363 F.3d 1316, 1321 (Fed. Cir. 2004) (applying equitable tolling to mental illnesses). Further, the appellant's letter accompanying his NOA makes clear that he had knowledge of the correct date to file his NOA, as it is dated August 30, 2016, and the appellant's NOA was submitted by counsel. Although the Court is sympathetic, the requirement to file an NOA within 120 days, as determined by Congress, is not onerous, and the appellant has failed to demonstrate that extraordinary circumstances prevented him from filing within the allotted time.

Upon consideration of the foregoing, it is

ORDERED that the appeal is DISMISSED as untimely.

DATED: November 30, 2016

BY THE COURT:



ALAN G. LANCE, SR.

Judge

Copies to:

Maxwell D. Kinman, Esq.

VA General Counsel (027)